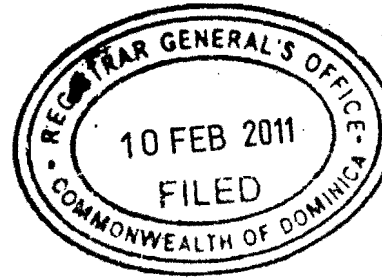


COMMONWEALTH OF DOMINICA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)



CLAIM NO DOMHCV2009/0166

BETWEEN:

STAPHINE EMANUEL

Claimant/Respondent

AND

CLYDE JENSON LECOINTE

Defendant/Applicant

Appearances:

Ms Rose-Anne Charles for Claimant/Respondent

Ms Laurina Vidal for Defendant/Applicant

.....
2010: July 7

2011: February 10
.....

- [1] The Defendant, (Mr Lecoite) seeks an order setting aside the default judgment dated 20th May 2010.
- [2] The Claimant, (Ms Emanuel) issued the Claim Form and Statement of Claim on 19th May 2009 to recover the sum of \$62,716.94 which she says is the amount she contributed to, and owing to her under a joint venture agreement for the construction and operation of a poultry farm.
- [3] On 4th May 2010, Ms Emanuel obtained default judgment in the sum of \$69,249.29 inclusive of court fees, fixed costs and interest. The judgment sum contains an alteration which has been initialed. The court has no knowledge as to who initialed the judgment. I note also that the claimant erroneously requested and obtained legal practitioner's fixed costs on issue in the sum of \$3000.00, when it should have been \$1500.00. As well, the Registrar failed to appreciate the definition of "claim for specified sum of money" set out in Rule 2.4, and as such, erroneously entered judgment in the sum of \$69,249.29 although neither the claim form nor statement of claim was accompanied by any receipted bills

evidencing the \$69,249.29. To my mind, these errors are serious enough to warrant setting aside the default judgment under CPR 13.2.

- [4] Coming to the grounds of the application. According to Mr Lecointe, he has never been served with the Claim Form or Statement of Claim. He was not aware of any claim pending against him; He has never seen the documents. Consequently, no acknowledgement of service and no defence were entered. He became aware of the default judgment between 5th and 9th May 2010. He now has the burden of having to set it aside.

Should the default judgment be set aside?

Positions of the parties

- [5] Learned counsel for the applicant (Ms Vidal) submitted that the default judgment should be set aside as of right for irregularity because of improper service. She submitted that there was inadequate proof of service, in that Officer St Ville failed to state precisely the manner of service and the precise manner by which Mr Lecointe was identified. She pointed to the Affidavit of Ms Emanuel wherein she stated that she went to the scene to point out Mr Lecointe to Officer St Ville. She also posited that the default judgment should have been for failure to acknowledge service and not for failure to file a Defence because no Acknowledgement of Service had been filed. By Ms Vidal's submission, the affidavit evidence suggests that service was improper. The correct procedures with respect to service were not followed. As such the judgment should be set aside as of right for irregularity, submitted Ms Vidal.
- [6] Learned counsel for the Claimant (Mrs Charles) on the other hand was of the view that Mr Lecointe was properly served. She pointed to the affidavit of service of Officer St Ville wherein he deposed that he personally served Mr Lecointe, stating date and place of service and how he recognized him. Ms Charles then referred me to the case of **Wenham v Downs (1835)** 1 Hare & W 216. In that case, the defendant behaved in a violent manner as to prevent a formal service of a ruling with respect to payment of costs, and he was aware of the intention to serve him. It was held that there was sufficient service to warrant an attachment.

Discussion and decision

- [7] The CPR 2000 set out two situations in which the court may set aside a default judgment. The first is in the context of rule 13.2 where judgment is irregularly obtained. In that case the default judgment will normally be set aside as of right, with or without an application.
- [8] In the second situation, judgment has been regularly obtained and the Defendant is asking the court to exercise its discretion to set aside the default judgment. In the latter case the court must consider various factors under rule 13.3 in determining whether to exercise its jurisdiction.

[9] As Rawlins JA noted in **Michael James v Tasman Group Inc and Betcorp Limited**, Antigua and Barbuda Civil Appeal No 6 of 2006 at paragraph [15], page 6, service of court process is the means by which a court commands a Defendant to answer to a claim. This service must be done in a proper manner.

[10] In his affidavit in support of the application to set aside, sworn to and filed on 20th May 2010, Mr Lecointe deposed that on or about 20th May 2009, while sitting in his bus at the Mahaut Bus Stop on River Bank, Roseau, Mr Lecointe was approached by a Police Officer. He later found out that this Police Officer was Constable Steven St Ville. Officer St Ville asked him whether he was the driver of bus registration number HB728. He answered yes. Officer St Ville then threw a document in his direction and said "you are served". The document struck Mr Lecointe in his face and fell on his lap. Mr Lecointe threw the document back at Officer St Ville and told him that he had assaulted him by striking him with the paper in his face. While Officer St Ville was picking up the document, Mr Lecointe drove off. The next day he reported the matter to the Commissioner of Police, who promised to look into the matter.

[11] Officer St Ville did not file a responding affidavit. However, there is an affidavit of service sworn by him on 16th July 2009. I think it convenient to reproduce it:

" I Steven St Ville, Police Constable No 237 of Dominica Police Force make oath and say as follows:

1. That on Wednesday the 20th day of May 2009 at 1:15 in Mahaut, Commonwealth of Dominica, I personally served Clyde Jenson Lecointe with a true copy of the following documents:
 - Claim Form dated the 18th day of May and filed on 19th day of May 2009, issued out of the High Court of Justice, Bayfront, Roseau, Commonwealth of Dominica.
 - Statement of Claim dated 18th day of May 2009 and filed on 19th day of May 2009, issued out of the High Court of Justice, Bayfront, Roseau, Commonwealth of Dominica.
2. That at the time of service I recognized the said Defendant when he indicated to me that he was Clyde Jenson Lecointe.
3. And after serving the said documents on him, his subsequent conversation to me indicated to me that he was the Defendant in the above mentioned matter...."

[12] Rule 5.5(1) deals with proof of personal service:

"1 Personal service of the claim form is proved by an affidavit of service sworn by the server stating –

- (a) the date and time of service;
- (b) the precise place or address at which it was served;
- (c) the precise manner by which the person on whom the claim form was served was identified; and
- (d) precisely how the claim form was served."

'2 If the person served was identified by another person, there must also be filed where practicable an affidavit by that person –

- (a) proving the identification of the person served; and
- (b) stating how the maker of the affidavit was able to identify the person served."

"3 (a) to (b)"

[13] On 25th June, 2010, Ms Emanuel swore to and filed an affidavit in reply to the application to set aside the default judgment. In that affidavit, Ms Emanuel purports to refute the allegations of improper service contained in Mr Lecointe's affidavit in support of the application to set aside. She deposed that she was nearby when Officer St Ville served Mr Lecointe with the documents. She went there to ensure that Lecointe was properly identified and that service was properly effected on him. She was parked nearby and had a clear view of Officer St Ville and Mr Lecointe. She saw Officer St Ville approached Mr Lecointe with the documents. Officer St Ville attempted to hand the documents to Lecointe and he then placed the documents near Mr Lecointe while he was sitting in the bus. In my opinion, Ms Emanuel's evidence as to service is speculative and is of questionable admissibility. I reject so much of her evidence as relates to service or seeks to provide proof of service of the documents. This evidence should have come from Officer St Ville.

[14] Looking at the affidavit of Ms Samuel, it is clear to me that Mr Lecointe was identified by her. However, in breach of rule 5.5 (1) (c), Officer St Ville failed to state the precise manner by which Mr Lecointe was identified. As well, he failed to state precisely how the Claim Form was served. I am not convinced by Officer St Ville's account as to how service was effected. I am of the view, based on the evidence before me, that service was improper.

[15] I would have thought that the Claimant would have caused Officer St Ville to swear an affidavit in reply to Mr Lecointe's affidavit as to the manner of service. He has not refuted Mr Lecointe's version of events. So I fail to see how **Wenham v Downs** can assist the Claimant. In **Wenham**, service was prevented because the Defendant behaved violently. In the instant case, there is no evidence that service was prevented due to violence by the Defendant.

[16] In **Royal Trust Corp of Canada v Dunn**, Borins J. commented at pages 478-479 as follows:

"If the Defendant can establish that the correct procedures have not been followed either in obtaining judgment or in relation to some step taken by the plaintiff in the commencement of the proceedings, such as in failing to serve the statement of claim in a proper manner, then normally the defendant can have the judgment set aside as of right without the requirement of establishing a defence to the plaintiff's claim."

[17] This application falls squarely within the words of Borins J.

[18] In order for Ms Emanuel to properly obtain default judgment, she would have had to serve Mr Lecointe with the Claim Form and Statement of Claim in a proper manner. Proof of proper service must be shown in the affidavit of service of the process server.

[19] Officer St Ville deposed that he personally served Lecointe with the documents. A Claim form is served personally on an individual in the jurisdiction by handing it to him or by leaving it with the person to be served at a place in the jurisdiction. It means therefore that throwing a document in the face of an individual would be a procedural irregularity. So far this bit of evidence stands uncontroverted.

[20] That having been said, I now say that even if Officer St Ville threw the documents at Mr Lecointe, which allegation has not been challenged by officer St Ville, it is apparent, based on Mr Lecointe's evidence that he did have sight of the documents – at least for two seconds. This is borne out in paragraph 5 of his affidavit where he deposed "... Within two seconds ... I threw the document back at him..." So by his own admission the documents did in fact come to the hands of Mr Lecointe. He was aware of the intention to serve him with court process. According to him he was told "you are served". The documents fell in his lap after striking him in his face and he threw them back. It seems to me that when he threw the documents back at Officer St Ville and drove off, he was not only demonstrating his displeasure at the manner by which he was served, but was also he ignoring or evading service.

Conclusion

[21] Notwithstanding my findings at paragraph [20] and having regard to the totality of the evidence, I conclude that there is no or no sufficient evidence upon which I can make a finding that service of the Claim Form and Statement of Claim was valid.

[22] Accordingly, I propose to set aside the default judgment.

[23] IT IS HEREBY ORDERED that

[1] The Default judgment entered on 4th May 2010 be and the same is hereby set aside for irregularity for improper service.

- [2] The Defendant will have 7 days from the date of this order to file and serve his Defence, failing which judgment will be entered for the Claimant for damages to be assessed.
- [3] If the parties cannot agree on costs, they must make brief written submissions to me within 14 days for consideration at the next sitting.



Pearletta Lanns
Pearletta Lanns
Master